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ABDUL RAHIM SULEIMAN & ANOR v. FARIDAH MD LAZIM & ORS

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
IDRUS HARUN JCA
B MARY LIM JCA
[CIVIL APPEAL NO: W-02(NCC)(A)-287-02-2015]
2 AUGUST 2016

C ***COMPANY LAW:*** *Directors – Proceedings on behalf of company – Companies Act 1965 ('Act'), s. 181A – Leave of court – Whether directors were complainants within meaning of s. 181(4)(a) & (b) of Act – Whether directors gave 30 days notice to other directors of intention to apply for leave of court – Whether application for leave made in good faith – Whether leave of court ought to be granted in interest of company*

D The appellants, as shareholders of the eighth respondent, filed a petition at the High Court under s. 181 of the Companies Act 1965 ('Act') to be placed as a director of the eighth respondent. The petition was allowed and after becoming a director of the eighth respondent, the first appellant discovered that (i) there were no accurate audited accounts from 2002 to 2012 showing the true and fair view of the eighth respondent; (ii) the eighth respondent's E funds were misappropriated by its directors and/or management; and (iii) the court actions to recover the misappropriated monies were not properly enforced. The appellants filed an originating summons ('OS') for leave under s. 181A of the Act to commence a derivative action in a representative capacity on behalf of the eighth respondent. In construing s. 181A(1), (3) and F (4)(a) and (b) of the Act, the High Court Judge ('HCJ') stated that four conditions had to be fulfilled by the appellants before the High Court could exercise its discretion to grant leave, namely (i) the appellants should be a complainant within the meaning of s. 181(4)(a) and (b) of the Act ('first condition'); (ii) s. 181B(2) of the Act requires the appellants to give 30 days G notice to the eight respondent's directors of their intention to apply for leave of court under s. 181A of the Act ('second condition'); (iii) the appellants must act in good faith as required by s. 181B(4)(a) of the Act ('third condition'); and (iv) whether, pursuant to s. 181B(4)(b) of the Act, it appeared that a *prima facie* case to be in the interest of the eighth respondent for leave of court to be granted ('fourth condition'). The HCJ dismissed the H appellants' OS on the ground that despite fulfilling the first and third conditions, the appellants failed to satisfy the second and fourth conditions. Hence, the present appeal. The issue that arose for the court's adjudication were whether the appellants had satisfied the four conditions.

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Held (allowing appeal)
Per Idrus Harun JCA delivering the judgment of the court:

(1) The HCJ held that the second condition was not satisfied because there were additional requirements which the appellants failed to comply. The HCJ had manifestly fallen into error in imposing the additional requirements because s. 181B(2) of the Act merely requires the complainant to give 30 days notice of the intention to apply for the leave of the court. There is no ambiguity to the words used in the sub-section and neither does it require additional words to be read into it. A separate 30 days notice had each been given by the appellants on two different occasions. Each of the appellants' notice had sufficient particulars to comply with the second condition, setting out the appellants' intention to apply for the leave of the court. Furthermore, there is nothing in s. 181B(2) of the Act which provides for a statutory requirement nor any time frame for the appellants to commence leave proceedings in the present action after the expiry of the 30 days notice. (paras 23, 24 & 32)

(2) Evidence showed that *prima facie,* it appeared to be in the best interest of the eighth respondent for leave to be granted. The appellants have fulfilled the fourth condition. The eighth respondent would gain substantially in money and money's worth if the appellants were allowed to pursue the claim by derivative action. The appellants have also shown on the basis of probability that the first and second respondents were not acting in the best interest of the eighth respondent. This conversely proved that the appellants were in fact acting in good faith for the eighth respondent and appeared *prima facie* to have acted in the best interest of the eighth respondent. (paras 37, 47 53 & 59)

Bahasa Malaysia *Headnotes*

Perayu-perayu, sebagai pemegang saham responden kelapan, memfailkan petisyen di Mahkamah Tinggi di bawah s. 181 Akta Syarikat 1965 ('Akta') untuk dilantik sebagai pengarah responden kelapan. Petisyen tersebut dibenarkan dan selepas menjadi pengarah responden kelapan, perayu pertama mendapati (i) tiada akaun audit tepat dari 2002 hingga 2012 yang mencerminkan keadaan jelas dan sebenar responden kelapan; (ii) dana responden kelapan disalah guna oleh para pengarahnya dan/atau pihak pengurusannya; dan (iii) tindakan-tindakan mahkamah untuk mendapatkan semula wang yang disalah guna tidak dikuatkuasakan dengan teratur. Perayu-perayu memfailkan saman pemula ('SP') bagi kebenaran di bawah s. 181A Akta untuk memulakan tindakan terbitan dalam kapasiti perwakilan bagi pihak responden kelapan. Dalam mentafsir s. 181A(1), (3) dan 4(a) dan (b) Akta, Hakim Mahkamah Tinggi ('HMT') menyatakan bahawa perayu-perayu perlu memenuhi empat syarat sebelum Mahkamah Tinggi boleh menjalankan bidang kuasanya untuk memberi kebenaran, khususnya (i) perayu-perayu mestilah pengadu bagi maksud s. 181(4)(a) dan (b) Akta ('syarat pertama');

(ii) s. 181B(2) Akta menghendaki perayu-perayu memberikan notis 30 hari kepada para pengarah responden kelapan, menyuarakan hasrat mereka untuk memohon kebenaran mahkamah di bawah s. 181A Akta ('syarat kedua'); (iii) perayu-perayu mesti bertindak secara suci hati seperti yang diperuntukkan oleh s. 181B(4)(a) Akta ('syarat ketiga'); dan (iv) sama ada di bawah s. 181B(4)(b) Akta, terdapat kes *prima facie* bahawa kebenaran wajar diberi demi kepentingan responden kelapan ('syarat keempat'). Hakim Mahkamah Tinggi menolak SP perayu-perayu atas alasan bahawa walaupun syarat pertama dan ketiga dipenuhi, perayu-perayu gagal memenuhi syarat kedua dan keempat. Oleh itu, rayuan ini. Isu yang dibangkitkan untuk pertimbangan mahkamah adalah sama ada perayu-perayu memenuhi keempat-empat syarat.

Diputuskan (membenarkan rayuan)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Hakim Mahkamah Tinggi memutuskan bahawa syarat kedua tidak dipenuhi kerana perayu-perayu gagal memenuhi keperluan-keperluan tambahan. Hakim Mahkamah Tinggi jelas terkhilaf dengan mengenakan keperluan-keperluan tambahan kerana s. 181B(2) Akta sekadar memerlukan pengadu memberikan notis 30 hari bagi menyatakan hasratnya untuk memohon kebenaran mahkamah. Tiada ketaksamaran dalam perkataan-perkataan yang diguna dalam sub-seksyen ini dan perkataan tambahan juga tidak diperlukan untuk mentafsirnya. Perayu-perayu masing-masing telah memberi notis 30 hari yang berasingan pada dua masa berasingan. Notis perayu-perayu mengandungi butiran yang cukup untuk mematuhi syarat kedua, menyatakan hasrat mereka memohon kebenaran mahkamah. Tambahan lagi, tiada apa-apa dalam s. 181B(2) Akta yang memperuntukkan keperluan statutori atau jangka masa untuk perayu-perayu memulakan prosiding kebenaran dalam tindakan ini selepas luput notis 30 hari.

(2) Keterangan menunjukkan bahawa secara *prima facie* kebenaran wajar diberi demi kepentingan responden kelapan. Perayu-perayu jelas sekali memenuhi syarat keempat. Responden kelapan akan mendapat sejumlah besar wang dan nilai wang jika perayu-perayu dibenarkan meneruskan tuntutan melalui tindakan terbitan. Perayu-perayu berjaya membuktikan atas asas kebarangkalian bahawa responden pertama dan kedua tidak bertindak demi kepentingan responden kelapan. Ini sebaliknya membuktikan bahawa perayu-perayu sebetulnya bertindak suci hati demi responden kelapan dan *prima facie* bertindak demi kepentingan responden kelapan.

Case(s) referred to:
Browne v. Dunn [1894] 6 R 67 ***(refd)***
Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA ***(refd)***
Foss v. Harbottle [1843] 67 ER 189 ***(refd)***
Howard Smith Ltd v. Ampol Petroleum Ltd [1974] 1 All ER 1126 ***(refd)***
Jayakumar Rajoo Mohamad v. CIMB Aviva Takaful Bhd [2015] 9 CLJ 552 CA ***(refd)***

Malayan Banking Bhd v. Foo See Moi [1981] 1 LNS 95 FC ***(refd)***
Mehdi Dadashi Havadaragh v. Ketua Pengarah Jabatan Kastam Diraja Malaysia & Ors [2015] 4 CLJ 607 CA ***(refd)***
NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1986] 1 LNS 79 SC ***(refd)***
Ontario Ltd v. Bernstein [2000] OTC 758 ***(refd)***
Pang Yong Hock & Anor v. PKS Contracts Services Pte Ltd [2004] 3 SLR 1 ***(refd)***
Re Bellman et al and Western Approaches Ltd (1981) 130 SLR (3d) 193 ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***
Suhaimi Ibrahim & Ors v. Hi-Summit Construction Sdn Bhd & Ors [2014] 1 LNS 1770 CA ***(refd)***
Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***
Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals [2004] 2 CLJ 617 CA ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 132(1), (1E), 181, 181A(1), (3), (4)(a), (b), 181B(2), (4)(a), (b), 181C, 181D, 181E, 364(2)
Limitation Act 1953, ss. 6(1)(a), (2), 29(a), (b)

Business Corporations Act [Canada], s. 232(2)

For the appellants - David Hoh & Chris YH Tanj; M/s Lim & Hoh
For the 1st, 2nd, 4th & 5th respondents - Jeev Anand; M/s Jeev Anand & Partners
For the 8th respondent - Ravindara Kumar; M/s Jeev Anand & Partners

[Editor's note: For the High Court judgment, please see Abdul Rahim Suleiman & Anor v. Faridah Md Lazim & Ors [2015] 1 LNS 313 (overruled). For the order of the Court of Appeal, please see [2016] 1 LNS(O) 1.]

Reported by Najib Tamby

JUDGMENT

Idrus Harun JCA:

Preliminaries

[1] The originating summons filed by the appellants on 9 July 2014 chiefly concerned an application for leave to commence a derivative action in a representative capacity on behalf of Semangat Motor Sdn Bhd (the eighth respondent herein) under s. 181A of the Companies Act 1965 (the Act) which resulted in due course in the dismissal of the said application by the High Court on 21 January 2015. The appeal before this court is directed against the decision of the learned judge in dismissing the appellants' application. It is noteworthy that during the hearing of this appeal, the third, sixth and seventh respondents were not represented and were absent. On 22 February 2016, we unanimously allowed the appeal. We shall deal with the nature of the appellants' application and material facts first and thereafter consider the merits of, and give our reasons for, allowing this appeal.

A **The Originating Summons**

[2] In their application, the appellants set out the purposes for which the leave to commence derivative action is sought and these are, to commence, continue, intervene in and/or defend on behalf of the eighth respondent new and/or existing actions, including interlocutory applications, appeals
B execution, bankruptcy and/or committal proceedings against former and/or current directors of the eighth respondent and/or other parties liable to the eighth respondent for its benefit including but not limited to:

(a) continuing, the following eighth respondent's court cases:

C (i) Kuala Lumpur High Court Originating Summons No: D5-24-15-2006 between the eighth respondent and Zainal Abidin bin Tun Sulaiman (the third respondent herein) and one other;

(ii) Kuala Lumpur High Court Summons No: D5-24-228-2006 between the eighth respondent and Mohd Shah Tun Sulaiman (the sixth
D respondent herein) and one other;

(iii) Kuala Lumpur High Court Summons No: D4-22-1757-2006 between the eighth respondent and Messrs How, Zul & Low and one other; and

E (iv) Shah Alam High Court Summons No: 22-1061-2009 between the eighth respondent and Messrs Hafiz & Co; and

(b) against the eighth respondent's former directors namely the third respondent to sixth respondent and the current directors namely the first and second respondents.

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[3] The originating summons is also seeking, *inter alia,* that:

(a) the first appellant shall be allowed to fully control the conduct of all aspects of the eighth respondent's proceedings including such new and/or existing eighth respondent's actions above named in the name and for
G the benefit of the eighth respondent;

(b) the respondents and/or its agents, company secretary, solicitors, auditors, accountants, officers and/or employees past and/or present shall disclose and provide all immediate assistance and/or full information to the appellants concerning delivery and allow unlimited
H and full inspection of all of the eighth respondent's company books, financial records, accounts and records, which assistance also includes affirming affidavits, statutory declarations and/or witness statements as required for the proper conduct of court actions in the name and benefit of the eighth respondent;

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(c) the appellants and/or their solicitors or named authorised person/s shall be entitled to receive, duplicate or make clear copies of the abovementioned documents and use them in all or any of the court actions to commence, continue, intervene in and/or defend against the former and/or current directors and/or any third parties brought in the name and for the benefit of the eighth respondent;

(d) the eighth respondent, for the benefit of which a derivative action is allowed to be brought, shall fully indemnify the appellants in respect of the whole of the costs and expenses reasonably incurred by the appellants in bringing, intervening, commencing and/or maintaining such actions;

(e) such other orders, reliefs or directions as the court deems fit;

(f) parties are at liberty to apply for further directions or orders; and

(g) the eighth respondent shall pay and/or indemnify all the legal fees, costs and disbursements incurred by the appellants in connection with this leave application and/or other ancillary matters in connection pending the grant of leave, or pending the grant of any injunction by the court hearing the leave application.

[4] The appellants filed four affidavits in support of the originating summons. They are:

(a) the affidavit in support affirmed by the first appellant dated 8 July 2014 (the appellants' first affidavit);

(b) the supplemental affidavit affirmed by the first appellant on 23 July 2014 (the appellants' second affidavit);

(c) the plaintiff's affidavit no. 3 affirmed by the first appellant on 14 October 2014 (the appellants' third affidavit); and

(d) the plaintiff's affidavit in reply to sixth and seventh defendants' affidavit no. 1 affirmed by the first appellant on 4 November 2014 (the appellants' fourth affidavit).

The respondents in turn, affirmed the following affidavits:

(a) the second respondent's affidavits in reply no. 1 and 2 dated 25 August 2014 and 29 October 2014 respectively and also affirmed on behalf of the first respondent;

(b) the fourth respondent's affidavit in reply dated 25 August 2014 as administrator of the estate of Tun Sulaiman Ninam Shah;

(c) the fifth respondent's affidavits in reply no. 1 and 2 dated 25 August 2014 and 5 November 2014 respectively;

(d) the sixth respondent's affidavits in reply no. 1 and 2 dated 13 October 2014 and 6 November 2014 respectively; and

(e) the seventh respondent's affidavits in reply no. 1 and 2 dated 16 October 2014 and 6 November 2014 respectively.

The third respondent notably did not file any affidavit in reply in the High Court though duly served with the originating summons. The eighth respondent however, whilst not affirming any affidavit, filed a notice of intention to use the second and fifth respondents' affidavits in reply no. 1 and 2 and the fourth respondent's affidavit in reply to reply to the appellants' first, second and third affidavits. The fourth respondent did not file any affidavit in reply to the appellant's third affidavit. Instead, she filed a notice of intention to use the second and fifth respondents' affidavits in reply no. 1 and 2 to reply to the appellants' first, second and third affidavits.

Facts

[5] The facts of this case span from 1973 to current date. Based on the information that we have gathered from the appellants' affidavits, the eighth respondent was incorporated on 4 June 1973. From 1973 until present, the eighth respondent has changed management 13 times. The learned judge, we observe, had also taken note of this fact. The first appellant was a director and shareholder of the eighth respondent since 1973. However, he resigned as a director on 19 March 1985. The eighth respondent which was controlled by the late Tun Sulaiman Ninam Shah (Tun Sulaiman) and family only notified Suruhanjaya Syarikat Malaysia (SSM) in respect of the first appellant's resignation five years later when the eighth respondent's annual returns were filed on 17 December 1990 (exh. AR6 and exh. AR7). Thereafter, the eighth respondent was controlled and managed by the family of Tun Sulaiman and Kadar Shah bin Tun Sulaiman (Kadar Shah) before the first appellant returned to the management of the eighth respondent pursuant to the High Court's order dated 26 March 2012 (exh. AR24) made by Justice Mah Weng Kwai (the MAH order). The present directors and shareholders of the eighth respondent are as follows:

(a) directors

(i) Faridah binti Md Lazim (the first respondent) as at 6 March 2012;

(ii) Mariam binti Tun Sulaiman (the second respondent) as at 26 May 2005;

(iii) Abdul Rahim bin Suleiman (the first appellant) as at 26 March 2012;

(b) shareholders

(i) Faridah binti Md Lazim as administrator for the estate of Tun Sulaiman (the fourth respondent) – 132,347 shares;

(ii) Zainal Abidin bin Tun Sulaiman (the third respondent) – 1,000 shares; A

(iii) Abdul Rahim bin Suleiman (the first appellant) – 1,333 shares; and

(iv) Thahana Agencies Sdn Bhd (the second appellant) – 65,333 shares.

[6] The first respondent is principally the director of the eighth respondent since 6 March 2012 and also the administrator of the estate of Tun Sulaiman who passed away on 5 July 2003 (the fourth respondent). The third respondent, who was the son of Tun Sulaiman, was a former director of the eighth respondent from 19 December 1990 to 31 March 2014. Kadar Shah, who was another son of Tun Sulaiman, was a director of the eighth respondent from 26 May 2005 until he passed away on 19 November 2011. Kadar Shah's son, Kevin Shah bin Dato' Kadar Shah is the administrator of the estate of Kadar Shah (the fifth respondent). Both the sixth and seventh respondents who are also the sons of Tun Sulaiman were also former directors of the eighth respondent. To continue the narrative, within months after the incorporation of the eighth respondent, it was appointed as a sole Bumiputera dealer of Honda vehicles for the State of Johor by the Malaysian Honda Distributor, Kah Motors. The eighth respondent subsequently added another feather in its cap when the Ministry of International Trade & Industry ("MITI") accorded the eighth respondent the status of a sole authorised importer of Honda vehicles for the State of Johor which enabled it to obtain approved permits ("AP").

[7] The eighth respondent's winning streak continued when between the period of 1973 to 1980, its profits from car sales soared and at the height of its success four branches were opened within the State of Johor. Unfortunately thereafter, due to the economic recession, the car sales plummeted and the eighth respondent's business deteriorated. Consequently, it suffered financial hardship and lost its Honda dealership which was followed subsequently with the suspension by MITI of its Honda AP quota. The eighth respondent's business was reduced to merely selling APs instead. Around late 1983, the eighth respondent applied to MITI for its Honda AP quota to be converted to an "open type" AP for the importation of reconditioned vehicles. The application was approved by MITI. In the meantime, the eighth respondent's four branches were closed. The eighth respondent's only showroom remaining was also closed in 1990 and as events transpired, it then moved to an administrative office without a showroom at Tun Sulaiman's residence in Muar. As fate would have it, MITI subsequently rejected the eighth respondent's appeal on 18 June 2007 and revoked the AP quota. Thus, from 18 June 2007 onwards, the eighth respondent had not been in active car business. The last unqualified audited accounts prepared were for the period of 1986 and 1987 which reflected the true and fair view of the results of the business of the eighth respondent.

Thereafter, for 14 years, from the period of 1988 to 2002, no board meetings were convened to table the eighth respondent's audited accounts nor annual general meetings called to pass any of the same.

[8] The second appellant had repeatedly written to the eighth respondent to complain about its failure or refusal to prepare audited accounts, yet, the eighth respondent did not act on the second appellant's complaints. Subsequently on 21 September 2001, the second appellant lodged a complaint with the Companies Commission of Malaysia (CCM) (exh. AR28). Following this complaint, the CCM contacted the eighth respondent which purportedly began preparing for the 14 years outstanding audited accounts. The eighth respondent's audited accounts did not however reflect the true and fair view of the results of the business of the eighth respondent but were instead fraudulent, and this was because, the appellants alleged, the statements that the eighth respondent's principal activity was the sales of motor vehicle and its accessories and defined its revenue as proceeds from sales of motor vehicles were false since the eighth respondent was in the business of selling AP documents and its revenue was from the sales of AP documents, not motor cars.

[9] On 22 February 2002, the eighth respondent issued a notice of annual general meeting to be held on 9 March 2002 to, *inter alia*, adopt the audited accounts from 30 September 1988 to 30 January 2001. The appellants thereupon wrote to the eighth respondent notifying it of their inability to attend and to record written objections to the motion to adopt the audited accounts. Despite the appellants' respective objections, the motion to adopt the audited accounts for the period of 1988 to 2000 was passed. The motion to adopt the audited account for 2001 was however adjourned to 29 March 2002 which was eventually passed in spite of the appellants' objections. Both appellants had, on 24 November 2003, filed a Civil Suit No: D8-22-1906-2003 at the Kuala Lumpur High Court against the eighth respondent ("the 1906 Suit") to, *inter alia,* disclose all profit and loss accounts with proof documents to be provided. On 29 January 2007, the learned High Court Judge, Dato' Kang Hwee Gee allowed the appellants' application for disclosure (Kang's judgment). Following the Kang's judgment (exh. AR41), chronologically, on 30 November 2007, the eighth respondent gave its Public Bank's bank statements to the second appellant, on 6 December 2007, the eighth respondent admitted its failure to have the AP quota reinstated but was unwilling to wind up, and on 16 December 2007, the second appellant sought more documents and clarifications on the existence of any other bank accounts. The eighth respondent however has yet to fully comply with the Kang's judgment. Neither were the appellants allowed to view any of the eighth respondent's documents from the years 2003 to 2012.

[10] In 2006, the eighth respondent filed an Originating Summons No: D5-24-15-2006 against the third respondent and Mohd Nathir Che Suliman (Mohd Nathir), who was another son of Tun Sulaiman, for a declaration for the 60 APs to be returned to the eighth respondent and the return of the sum of RM600,000 being the proceeds of the 60 APs sold. A judgment in default was entered against the third respondent and in spite of the order, the eighth respondent had not taken any substantial execution proceedings to recover the same. On 5 March 2009, Mohd Nathir was adjudicated bankrupt. In 2006, the eighth respondent filed a Civil Suit No: D5-24-228-2006 against the sixth respondent for the return of RM1,440,000 and a judgment was entered against the sixth respondent on 19 July 2006. However, the eighth respondent had not taken effective execution proceedings for the recovery of the same. The sixth respondent did not appeal against the High Court's decision. In 2006, the eighth respondent sued their legal firm Messrs How, Zul & Low *vide* Kuala Lumpur High Court Summons No: D4-22-1757-2006 for the return of monies placed in trust amounting to RM2,017,247.75 and a consent judgment was entered on 7 February 2007 for the return of the said sum. However, there was no proof that Messrs How, Zul & Low had repaid the entire sum to the eighth respondent. The eighth respondent had also sued the partners of Messrs Hafiz & Co *vide* Shah Alam High Court Summons No: 22-1061-2009 to recover the sum of RM1,280,000 placed by the sixth respondent in trusts account. Although the order was given by the Shah Alam High Court dated 19 March 2011, the sum of RM1,280,000 has yet to be paid by Messrs Hafiz & Co.

[11] Through CCM's confirmation on 25 September 2010 (exh. AR51), the directors of the eighth respondent namely Mohd Nathir, Kadar Shah and the sixth respondent were found to have committed offences under ss. 364(2) and 132(1) of the Act respectively for which they had each been imposed compounds of RM10,000. Additionally, the eighth respondent's reply on 30 March 2011 (exh. AR54) to the appellants' request for the eighth respondent's Public Bank Account 3077595604 confirmed that:

(i) the eighth respondent's PB Cheque No. 569851 for RM1,498,706 had been paid to Kadar Shah's personal company known as Volta Geria Sdn Bhd ("Volta Geria") and there was no documentary proof that Volta Geria had returned the said amount to the eighth respondent; and

(ii) the eighth respondent had purportedly resolved that part of RM1,498,706 was used to repay the outstanding directors fee to the late Tun Sulaiman amounting to RM871,458.25 and to place the balance amount of RM627,247.75 on trust with the eighth respondent's then solicitors, Messrs How Zul & Low.

[12] In 2012, the appellants as shareholders, filed a Petition No: 26NCC-2-01-2012 at the Kuala Lumpur High Court under s. 181 of the Act (oppression petition) for, *inter alia,* to be placed as a director of the eighth respondent. On 26 March 2012, a consent order was granted by Justice Mah Weng Kwai ("MAH order"). After the MAH order, the first appellant became a director of the eighth respondent and discovered that:

(i) there were no accurate audited accounts from 2002 to 2012 showing the true and fair view of the eighth respondent, instead there were only qualified accounts;

(ii) the eighth respondent's funds were misappropriated by its directors and/or management; and

(iii) the court actions to recover misappropriated monies were not properly enforced.

[13] The appellants had also alleged that at the time Kadar Shah was the director of the eighth respondent, he had sold 134 APs to third parties and improperly caused the proceeds amounting to RM4,991,500 to be paid to a CIMB Bank account belonging to K Shah Energy Resources Sdn Bhd (KSERB) controlled by Kadar Shah. Another allegation which the appellants had made was that Tun Sulaiman and his two sons namely the third respondent and Mohd Nathir had wrongfully used the eighth respondent's funds for private and personal family expenses without resolution. Apart from authorised directors fees, the eighth respondent was wrongfully made to pay other unauthorised directors fees to Tun Sulaiman and the third respondent. There was no resolution or authority for such payments. The third respondent being a company secretary of the eighth respondent as well as a director had deliberately refused to hand over the documents to his brother, Kadar Shah. As a result, the MAH order was unable to be performed in that respect. The eighth respondent under the third respondent's and Mohd Nathir's management suffered losses amounting to RM19,607,510. As a director of the eighth respondent, the first appellant was not allowed to write to the eighth respondent's solicitors using the company's letterhead and denied access to documents by the first and second respondents as directors. In spite of the appellants' request on 9 April 2012 for an extraordinary general meeting (EGM) on 22 May 2012 to discuss *inter alia* reaudit of the annual accounts, payment of unauthorised directors fees, misappropriation of company funds and management of company bank accounts, no EGM date was fixed and the appellants had subsequently withdrawn their notice.

[14] On 28 January 2014, a notice for the EGM of the eighth respondent to be held on 19 February 2014 was issued (exh. AR113B) by order of the board of directors purportedly signed by the first and second respondents to discuss and approve the settlement proposal by the estate of Kadar Shah *vide* its letter dated 24 October 2013 (exh. MS19) and the settlement proposal by

the estate of Tun Sulaiman *vide* its letter dated 5 November 2013 (exh. MS21). On 9 February 2014, the first plaintiff wrote to the board of the eighth respondent to lodge his objections that the two settlement proposals of both estates had never been discussed at any board of directors (BOD) meeting and asked for the EGM to be postponed to enable a BOD meeting to be convened first. There was no response from the board. Thus on 19 February 2014, the first appellant had objected to the EGM on the ground that the proposals had never been discussed at any BOD meeting and asked for the EGM on 19 February 2014 to be postponed. The second respondent admitted that the two proposals had already been agreed prior to the EGM and was never discussed. Although the appellants had objected and voted against the two proposals, the two resolutions concerning the two proposals were recorded as passed. Consequently, the appellants filed the originating summons on 9 July 2014 for leave under s. 181A of the Act.

The High Court's Decision

[15] The learned High Court Judge, in construing s. 181A(1), (3), (4)(a) and (b) of the Act, stated that the following four conditions had to be fulfilled cumulatively by the appellants before the High Court could exercise its discretion to grant leave:

(a) the appellants should be a 'complainant' within the meaning of s. 181A(4)(a) and (b) of the Act (the first condition);

(b) section 181B(2) of the Act required the appellants to give 30 days' written notice to the eighth respondent's directors of their intention to apply for a leave of court under s. 181A (the second condition);

(c) the appellants must act in good faith as required by s. 181B(4)(a) of the Act (the third condition); and

(d) whether, pursuant to s. 181B(4)(b) of the Act, it appeared *prima facie* to be in the best interest of the eighth respondent for leave to be granted (the fourth condition).

[16] In dismissing the appellants' originating summons, the learned judge held that the appellants failed to satisfy the second and fourth conditions. The learned judge, however, accepted that the appellants were "complainants" within the meaning of s. 181A(4)(a) and (b) of the Act and that they had acted in good faith as required under s. 181B(4)(a) thereof.

The Appeal

[17] The appeal turns upon the main questions of whether firstly the appellants' written notices of intention to apply for the leave of court were sufficient and fulfilled the requirements of s. 181B(2) and secondly, with regard to the appellants' application for leave, it appeared *prima facie* to be in the best interest of the eighth respondent for such leave to be granted. The ancillary but material issues flowing from the above questions are:

(a) whether under the circumstances of this case, the appellants had unreasonably delayed the filing of the s. 181A application, after the 30 days notice period pursuant to s. 181B(2) had expired;

(b) whether the learned judge had erred in law and on the facts in failing to allow the appellants as complainants to intervene or continue in actions on facts discovered by the first appellant, when as a director, as well as to execute the four judgments already obtained for the benefit of the eighth respondent but not proceeded with by the majority directors of the eighth respondent;

(c) whether limitation has set in against the eighth respondent to bring actions against, *inter alia,* the fourth and fifth respondents in the light of the suppressed facts of fraud committed against the eighth respondent by the majority of directors, until proof discovered by the first appellant when he became a director again in 2012 and their admissions of such misappropriations of the eighth respondent's monies; and

(d) whether the appellants' past s. 181 oppression petition in their personal capacity bars them from bringing this s. 181A application to bring a derivative action on behalf of and in the best interest of the eighth respondent.

The Law

[18] It becomes immediately clear from the originating summons that the application for leave was made pursuant to s. 181A of the Act. Section 181A, which deals with proceedings on behalf of a company, was added to the Act together with related provisions in ss. 181B to 181E of the Act and it came into force on 15 August 2007 *vide* PU(B)297/2007. The section allows a complainant, with the leave of the court, to bring, intervene in or defend an action on behalf of the company. Such proceedings must be brought in the name of the company. It ought however to be emphasised that s. 181A(3) declares that the right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is not abrogated. Therefore, the provisions, we apprehend, eminently provide another dimension to the common law "proper plaintiff rule" laid down by the House of Lords in *Foss v. Harbottle* [1843] 67 ER 189. As an amplification of the exceptions to the said common law rule in *Foss v. Harbottle*, *supra* which allows minority shareholders to seek remedy on behalf of the company by way of an equitable remedy of derivative action for wrongdoings done by the wrongdoers who are in control of the company, s. 181A of the Act in fact is an additional statutory exception to the said proper plaintiff rule, which allows a complainant to obtain the leave of the court to commence proceedings on behalf of the company.

[19] Section 181A of the Act is in the following terms:

181A Proceedings on behalf of a company

(1) A complainant may, with the leave of the Court, bring, intervene in or defend an action on behalf of the company.

(2) Proceedings brought under this section shall be brought in the company's name.

(3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is not abrogated.

(4) For the purposes of this section and sections 181B and 181E, "complainant" means:

(a) a member of a company, or a person who is entitled to be registered as member of a company;

(b) a former member of a company if the application relates to circumstances in which the member ceased to be a member;

(c) any director of a company; or

(d) the Registrar, in case of a declared company under Part IX.

[20] Sub-section (4) of s. 181A of the Act defines 'complainant'. Thus, if any person falls within the definition of 'complainant', such person is plainly entitled to apply for the leave of the court pursuant to s. 181B of the Act. The learned judge, in this regard, had found that the appellants had fulfilled the requirement under sub-s. (4). Turning now to His Lordship's finding that the appellants failed to show that "it appeared *prima facie* to be in the best interest of the eighth respondent that the application for leave be granted, this finding in fact relates to the requirement under s. 181B(4)(b) of the Act. We reproduce for easy reference, s. 181B below:

181B Leave of Court

(1) An application for leave of the Court under section 181A shall be made by Originating Summons and no appearance need to be entered.

(2) The complainant shall give thirty days notice in writing to the directors of his intention to apply for the leave of Court under section 181A.

(3) Where leave has been granted pursuant to an application under section 181A, the complainant shall initiate proceedings in Court within thirty days from the grant of leave.

(4) In deciding whether or not leave shall be granted the Court shall take into account whether:

(a) the complainant is acting in good faith; and

(b) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.

[21] Both ss. 181A and 181B, we apprehend and concisely:

(a) allow a complainant, with leave of the court to bring, intervene in or defend an action on behalf of the company;

(b) require proceedings commenced under s. 181A to be brought in the company's name;

(c) preserve the right of any person to bring, intervene in or defend or discontinue any proceedings on behalf of a company at common law;

(d) require the complainant to be a member of the company or a person who is entitled to be registered as member of the company, or a former member of the company if the application relates to circumstances in which the member ceased to be a member, or any director of the company, or the Registrar, in case of a declared company under Part IX of the Act;

(e) require an application for leave of the court under s. 181A to be made by originating summons but does not require an appearance to be entered;

(f) require the complainant to give 30 days notice in writing to the directors of his intention to apply for the leave of court under s. 181A;

(g) do not provide a statutory requirement nor any time frame for a complainant to initiate leave proceedings once the complainant has given the 30 days notice in writing in (f);

(h) where leave has been granted, require the complainant to initiate proceedings in court within 30 days from the grant of leave; and

(i) in deciding whether or not leave ought to be granted, require the court to take into account whether:

(i) the complainant is acting in good faith; and

(ii) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.

Accordingly, it does indeed go without saying that where the requirements under both ss. 181A and 181B of the Act are fulfilled, the complainant and in this case, the appellants, ought to be given leave to commence on behalf and in the name of the company namely the eighth respondent derivative actions as prayed for in their originating summons.

Whether The Second Condition Had Been Fulfilled

[22] The second condition as adverted to by the learned judge in his grounds of judgment relates to the alleged non-compliance of the appellants' notices with the requirements under s. 181B of the Act. We were pressed in this respect by learned counsel for the respondents with the argument that the

appellants' notices under s. 181B of the Act did not comply with the said section as the same did not specify clearly the proposed actions by the appellants as such the first and second respondents could not be faulted for not taking action with regard to the notices. The appellants' alleged non-fulfilment of the second condition was discussed by the learned judge in Part N of the grounds of judgment. We may necessarily mention at this point that both the first and second appellants had each sent their s. 181A written 30 days notices on 10 October 2013 and 29 January 2013 respectively. The fact that the appellants in each of their s. 181A written notice gave a 30 days notice as required under s. 181B(2) of the Act is not disputed. The reasons we gleaned from the grounds of judgment as to why the appellants failed to satisfy the second condition revealed the following:

(a) the non-fulfilment of the additional requirements for such written notice under s. 181B(2) that was put forward and imposed by the learned judge for the second condition;

(b) the second appellant's notice dated 29 January 2013 was marked "without prejudice" (second appellant's notice");

(c) the second appellant's notice was superseded by the second appellant's letter dated 18 May 2013; and

(d) the second appellant did not take any action within a reasonable time after the expiry of the 30 days written notice.

Insofar as it concerns the first appellant's notice, the learned judge's reasoning was that after the first appellant's notice dated 10 October 2013, the first appellant had sent another letter dated 12 November 2013 and the same had effectively nullified the notice dated 10 October 2013 as it had requested to requisition a meeting of the eighth respondent's BOD. Therefore, the learned judge, echoing learned counsel's earlier submission, concluded that the eighth respondent's directors could not be faulted for not taking any action in relation to the said notices.

Additional Requirements

[23] In postulating and imposing the additional requirements, the learned judge cited the Court of Appeal's decision in *Suhaimi Ibrahim & Ors v. Hi-Summit Construction Sdn Bhd & Ors* [2014] 1 LNS 1770; [2015] 2 MLJ 669 noting that the company's internal process should be exhausted before an application under s. 181A of the Act could be filed. In *Suhaimi Ibrahim*, *supra* the Court of Appeal held that the internal process of the company needed to be satisfied before commencing leave action under s. 181A. Having said that, we do not intend to deal with the decision in *Suhaimi Ibrahim* at this point. We shall first deal with the other issues raised in the preceding paragraph of this judgment which led to the finding by the learned judge that the second

condition was not satisfied. We shall return later to the issue raised by the learned judge in relation to *Suhaimi Ibrahim*. At para. 73 of the grounds of judgment, the learned judge dealt with the issue of "additional requirements" and held as follows:

> notice given by a plaintiff **can only comply with the 2nd Condition** if the notice contains sufficient information so as to give **reasonable notice** to the company's directors:
>
> (a) regarding the plaintiff's intention to apply to a court under section 181A in respect of the 3 Options; and
>
> (b) to decide whether the company should embark on any one or more of the 3 Options. (emphasis added)

These are the additional requirements in respect of which the learned judge held that the appellants had failed to comply.

[24] The issue relating to the three options arose when the learned judge, in the course of construing s. 181A(1) of the Act, stated that the clear wording in the sub-section only allowed a complainant to:

(a) bring a new action on behalf of a company (first option);

(b) intervene in the name of a company in a pending action which does not involve the company (second option); or

(c) defend a pending action against a company (third option).

Obviously, these are the three options referred to by the learned judge in the above extract from the grounds of judgment. In our opinion, the learned judge had manifestly fallen into error in imposing the additional requirements because s. 181B(2) of the Act merely requires the complainant to give 30 days notice of his intention to apply for the leave of court. There is no ambiguity to the words used in the sub-section neither does it require additional words to be read into it. It is expressed in very plain, simple and unambiguous terms which evince a clear and unmistakable intention that:

> The Complainant shall give thirty days notice in writing to the directors of his intention to apply for the leave of Court under section 181A.

It is an undisputed fact that a separate 30 days notice had each been given by the first and second appellants on two different occasions. Each of the appellants' notice had sufficient particulars to comply with the second condition setting out the appellants' intention to apply for the leave of the court (see exhs. AR97 and 99). We cannot therefore, accede to the argument urged for the respondents that the appellants' notices did not comply with s. 181B of the Act.

[25] The court's duty in statutory interpretation is well settled. Seah SCJ (as he then was) sitting in the Supreme Court in *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; [1987] 1 MLJ 39 said:

> … The duty of the Court, and *its only duty is to expound the language of the Act in accordance with the settled rules of construction. The Court has nothing to do with the policy of any Act which it may be called upon to interpret*… (emphasis added)

In *Jayakumar Rajoo Mohamad v. CIMB Aviva Takaful Bhd* [2015] 9 CLJ 552; [2015] 6 MLJ 437, the Court of Appeal summed up the position of law as follows:

> [20] In construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. *Accordingly, the duty of the court is limited to interpreting the words used by it. The Court will not read words into a statute unless clear reason for it is to be found in the statute itself.*
>
> [21] Therefore, in construing any statutes, *the court will firstly look at the words in the legislation and apply the plain and ordinary meaning of the words in the statute. If there is any ambiguity to the words used, the court is duly bound to accept it even if it may lead to mischief. But where the language used is clear and unambiguous, it is not the function of the court to re-write the statute in a way which it considers reasonable. But if the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used.* (emphasis added)

(See also *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673; [2007] 6 MLJ 581, FC at p. 590). Section 181B(2) of the Act contains clear language as to the requirement of 30 days notice in writing and nothing more. Therefore, it would be plainly wrong for the learned judge to read words into s. 181B(2) of the Act. Accordingly, the learned judge had made a fatal error in reading the additional requirements into the section.

[26] Furthermore, if Parliament had intended for "reasonable notice" to be given to the directors, this would have been expressly stated in s. 232(2) of the Canada's Business Corporations Act (BCA) which was referred to by the learned judge in para. 55(6) of the grounds of judgment. In *Tribunal Tuntutan Pembeli Rumah v. Westcourt Corporation Sdn Bhd & Other Appeals* [2004] 2 CLJ 617; [2004] 3 MLJ 17 Richard Malanjum JCA (as His Lordship then was) had this to say:

> [20] *We do not think there should be any additional or prerequisite term to be read into the provision. To do so would tantamount to adding what is not in the statute. And that should not be done since judges are not legislators.* That was echoed in *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd*…" (emphasis added)

In *Mehdi Dadashi Havadaragh v. Ketua Pengarah Jabatan Kastam Diraja Malaysia & Ors* [2015] 4 CLJ 607; [2015] 4 MLJ 646 Nallini Pathmanathan JCA said:

A

> [46] *… where words in a statutory provision have a plain and ordinary meaning, the court should not read additional words into the statute to curtail or narrow down the meaning of the words. The words 'give written notice' are plain and clear. They do not require any elaborate interpretation. Neither should those words be unduly restricted…* (emphasis added)

B In the premises and for the reasons discussed, we find that the learned judge had misdirected himself in this fundamental aspect of statutory interpretation in holding that the second condition would only be fulfilled if the notice contained the additional requirements. His Lordship in doing so, had wrongly construed the meaning of the words appearing in s. 181B(2) when the language used therein is clear and unambiguous.

C

The Second Appellant's Notice's "Without Prejudice" Marking

[27] Moving on, we now turn to the second appellant's 30 days written notice dated 29 January 2013 given in compliance with s. 181B(2) of the Act (exh. AR97). According to the learned judge, the second appellant's notice D was not intended to be admissible in evidence as it was sent on a "without prejudice" basis. It is also necessary to mention that, in fact, learned counsel for the respondents had also submitted before us that the second appellant's notice of 29 January 2013 was not intended to be admissible due to the marking of "without prejudice" thereon. With all due respect, even assuming E that the learned judge was correct in his decision on this point, His Lordship had failed to consider that as the appellants authored these notices marking them "without prejudice", they as authors were entitled to release such marking for litigation and trial purposes. Furthermore, the respondents did not object to such release of "without prejudice" documents to be used as F evidence. In any event, the authority of *Malayan Banking Bhd v. Foo See Moi* [1981] 1 LNS 95; [1981] 2 MLJ 17 cited by the learned judge can easily be distinguished from the present action. In that case, the letters written, without prejudice, contained matters relating to negotiations. The Federal Court held that letters written without prejudice were inadmissible in evidence of the negotiations attempted. Thus, clearly the decision by the G Federal Court was confined specifically to that type of document which contained the terms of negotiations which must be kept confidential so as not to jeopardise further negotiation. In the instant case, the document before us involved a notice issued pursuant to s. 181B(2) which would be used subsequently as evidence of compliance with the statutory requirement that H such notice had been issued and served on the eighth respondent. Such a marking in our view, could not have been intended to render and in fact would not have caused the notice which was validly issued and relevant for the purpose of the leave application, to be inadmissible. The learned judge's reasoning on this issue is, in our opinion, wholly misconceived.

I

The Second Appellant's Notice Dated 29 January 2013 Was Not Superseded By The Second Appellant's Letter Dated 18 May 2013 As The Company Internal Processes Were Being Exhausted

[28] The learned judge in para. 75(b) of the grounds of judgment had wrongly held by his own interpretation, without any evidential basis, that the second appellant's notice of 29 January 2013 was nullified because it was superseded by the second appellant's letter of 18 May 2013 (exh. AR98) wherein, the learned judge in para. 35 of his grounds of judgment noted that the said letter had stated that:

(a) the second respondent had proposed that the eighth respondent be wound up; and

(b) the second appellant was mindful of the second respondent's suggestion that further discussion was possible.

[29] The second appellant's letter of 18 May 2013 (exh. AR98) could not have superseded their notice dated 29 January 2013 because the facts found, through the appellants' conduct and letters shown below, clearly demonstrated that the appellants were attempting to exhaust all internal processes of the eighth respondent company:

(a) the subject matter of the letter dated 18 May 2013 was unrelated to and not on the subject of the notice of 29 January 2013 (exh. AR97) which was about the appellants' intention to file for leave to commence derivative suits for the eighth respondent which is the instant appeal before this court;

(b) the letter dated 18 May 2013 was a narrative summary of reasons why the appellants had failed to respond to the eighth respondent's recent correspondence;

(c) it was a specific response to the second respondent's e-mail dated 2 May 2013, which enquired about her earlier e-mail dated 8 April 2013 relating to the subject of the eighth respondent's winding up which failed to get the appellants' response;

(d) this fact in sub-para. (c) above is very clear even from the first sentence of the said letter, which made reference to the second respondent's letter dated 2 May 2013;

(e) the second sentence in the letter of 18 May 2013 answered the question the second respondent asked in her letter dated 2 May 2013:

> Yes, we did receive your earlier e-mail dated 8.4.2013 concerning the winding-up options.

(f) subsequent paragraphs of the letter dated 18 May 2013 narrated the goings-on of both parties' discussions and correspondence post s. 181A first notice of 29 January 2013 during the period of February 2013 to May 2013 which had stalled and the cause of the parties' apparent frustrations due to things not always going smoothly and in para. 5 it was stated:

> We noted the serious finality of your message from its tone and language and therefore did not attempt to respond further.

(g) notwithstanding the difficulties, both parties initially, did not lose faith as per para. 7.3 of the said letter dated 18 May 2013 wherein the appellants noted the eighth respondent's suggestion for further discussions and agreed to resume the same, *albeit* with some reservations as explained in subsequent paragraphs; and

(h) the discussions continued till it again failed during September 2013 when the eighth respondent and its agents withdrew its co-operation and became petty as evident by the fact that:

(i) the auditors refused to co operate;

(ii) the eighth respondent's solicitors refused to co operate (exh. AR104), when they had done so previously; and

(iii) even the eighth respondent objected to the appellants' use of the eighth respondent's letterhead when writing to its agents (exh. AR103).

The above problems triggered the issuance of the first appellant's s. 181A(2) written notice dated 10 October 2013 (exh. AP99).

[30] The above details concerning the second appellant's letter of 18 May 2013 clearly showed that the learned judge totally misconceived the contents thereof because the subject of winding up pre dated the said letter and was proposed by the second respondent, not the appellants, some months earlier. Likewise, the appellants agreed to resume further discussions at the eighth respondent's request (see paras. 7.3 and 7.4 of exh. AR98). In any event, the above serves to confirm the declaration on the subject made in the appellants' first affidavit dated 8 July 2014 in para. 124 which stated that:

> Sometime in late March/April 2013 in response to the TASB's 1st 181A Notice, SMSB essentially proposed to *inter alia* wind up SMSB.

For avoidance of doubt and for clarity, 'SMSB' referred to above is an acronym for the eighth respondent while 'TASB' is an abbreviation for the second appellant. The reasons we have alluded above, considered cumulatively, clearly show that there is absolutely nothing in the letter of 18 May 2013, whether expressly or impliedly, which supports the learned judge's finding that the same had superseded or nullified the second

appellant's notice of 29 January 2013 or is indicative of an intention, or from which it can be inferred, that the said letter was intended to supersede and nullify the said notice.

[31] The learned judge had also erred in his interpretation of the second appellant's letter dated 11 October 2013 (exh. AR100). This letter was the second appellant's belated reply to the eighth respondent's letter of eight months earlier dated 5 February 2013 (exh. MS18). His Lordship, in expressing the view that the notice dated 29 January 2013 did not fulfil the second condition referred to the second appellant's letter of 11 October 2013 (exh. AR100), said that the same had compounded the confusion when the second appellant alleged therein that the eighth respondent had committed an oppressive act against them. The letter, undeniably, was sent one day after the first appellant's s. 181B notice dated 10 October 2013 (exh. AP99) to record the appellants' disagreement concerning the contents of the eighth respondent's letter of 5 February 2013. The second appellant in the letter dated 11 October 2013 did actually deem the eighth respondent's decision not to convene the EGM as an oppressive act against the minority shareholder namely the second respondent. However nowhere did the letter indicate that the second appellant was contemplating the possibility of filing an oppressive suit under s. 181 of the Act as a minority shareholder of the eighth respondent against the majority shareholders of the eighth respondent. The learned judge therefore had manifestly misdirected himself when in para. 75(b) of the grounds of judgment, he hazarded a guess that the 11 October 2013 letter could be a source of confusion for the eighth respondent's directors as the eighth respondent would have thought that the second respondent was contemplating the possibility of filing an oppression suit under s. 181 of the Act against the majority shareholders of the eighth respondent. In any event, the respondents in this regard, never at any moment made an issue out of this letter in their affidavits. The letter could not have any bearing on the effectiveness of or be related to the second appellant's s. 181A notice dated 29 January 2013. Under the circumstances, it is irrelevant that the 11 October 2013 letter was sent after the expiry of the 30 days notice.

The Alleged Non-Action By The Second Appellant

[32] The learned judge found that there was non-action by the second appellant immediately after the expiry of 30 days of the s. 181B notice of 29 January 2013. This originating summons was only filed on 9 July 2014 implying that it was made a tad late in the day. His Lordship in this respect, had obviously failed to consider that the appellants were still in negotiations with the directors of the eighth respondent. Nevertheless, we would reiterate that there is nothing in s. 181B(2) of the Act which provides for a statutory requirement nor any time frame for the appellants to initiate or commence leave proceedings in the present action after the expiry of the 30 days notice.

[33] The learned judge, we observe, had also deemed the first appellant's s. 181B(2) written notice dated 10 October 2013 invalidated because it was nullified by the first appellant's letter dated 12 November 2013 (exh. AR106) which had requested:

> for a Board of Directors meeting to be held by December 2nd, 2013.

His Lordship consequently held that the eighth respondent's directors could not then be faulted for not taking any action in respect of the first appellant's s. 181B(2) written notice dated 10 October 2013 (at para. 76b of the grounds of judgment). We would necessarily mention that the letter of 12 November 2013 was sent after the 30 days period had lapsed on 9 November 2013. It does seem to us that when the learned judge considered that the notice dated 10 October 2013 invalidated as it was nullified subsequently by the letter of 12 November 2013, His Lordship was implying that communication between the parties must cease after the issuance of the s. 181B(2) notice.

[34] The learned judge had undoubtedly made unsubstantiated blanket assumptions over the issue relating to the letter of 12 November 2013. In fact, His Lordship failed to appreciate the fact that the appellants' requisition for the meeting of the BOD was not to discuss the s. 181B(2) notice of 10 October 2013 but to seek clarification concerning matters raised in the eighth respondent's letter dated 22 October 2013 (exh. AR101) that claimed 38% of monies misappropriated by the late Kadar Shah had been recovered. This was new information to the appellants because no agreement with the estate of Kadar Shah for the partial recovery of the 38% was disclosed as reached when parties held their last discussion in September 2013 pre s. 181B(2) second notice of 10 October 2013, when such discussions failed. The object of calling for the BOD meeting was amongst others to discuss the said claim of 38% partial recovery from the estate of Kadar Shah although the agenda given was for a broader subject concerning discussion for recovery of all monies that were misappropriated by the eighth respondent's ex-directors. There was, we found, not the slightest hint in the letter from which it could be said that it was related to the first appellant's notice dated 10 October 2013 or deemed to have nullified the said notice. The learned judge therefore had clearly fallen into error when without reasons given, His Lordship had held that the letter had nullified the first appellant's notice dated 10 October 2013 and the eighth respondent's directors could not be faulted for not taking any action on the s. 181B(2) notice dated 10 October 2013. Although the learned judge failed to rationalise the statement, the assumption was that the appellants' letter dated 12 November 2013 was the justification for His Lordship's finding that the eighth respondent's directors could not be faulted for not taking any action on the s. 181B(2) notice dated 10 October 2013. This is wrong. The learned judge had provided the eighth respondent justification when none existed. It would be wholly unjustified, as the learned judge had mistakenly decided, to associate the appellants' requisition for the BOD meeting to the s. 181B(2) notice dated 10 October 2013.

[35] Now, reverting to *Suhaimi Ibrahim*, when viewed as a whole, the appellants have shown the many efforts made by them to use all the company internal processes to find an amicable settlement when calling for a BOD meeting which was ignored, to try to ensure the company's assets were returned. The case of *Dato' Suhaimi Ibrahim* as adverted to earlier can thus be distinguished on the facts. In that case, it was this court which directed the parties to the case to call for a board meeting to resolve the issue in dispute. However, they had not been successful in having this meeting. That had driven this court to hold that the parties had not exhausted their internal remedies. This court therefore, held that for it to be satisfied that it was in the interest of the company to allow a statutory derivative action to be maintained, the internal processes of the company needed to be satisfied. In the instant action, the appellants had already exhausted the internal processes. The learned judge, in our view, had misconstrued the decision in *Dato' Suhaimi Ibrahim*. In any event, there is absolutely nothing in ss. 181A and 181B which shows that a complainant must exhaust a company's internal process before the complainant can initiate an application for leave. All that the complainant is required to do is to fulfil the requirements prescribed under both ss. 181A and 181B of the Act. The exhaustion of the company's internal process certainly is not one of them. The learned judge's reasoning on this aspect is a red herring. In our judgment, the appellants had fulfilled the second condition.

Whether The Fourth Condition Had Been Fulfilled

[36] The general tenor of the respondents' submission on this issue is that the appellants' application for leave to commence derivative suits is not in the best interest of the eighth respondent. The learned judge, in His Lordship's grounds of judgment went at length to hold that the appellants were unable to discharge the burden to satisfy a low threshold requirement on the *prima facie* basis that it appeared to be in the eighth respondent's best interest for leave to be granted for the derivative suits. We need only say on this aspect that firstly, the court, in an application for leave, should not go into the merits of the case at the leave stage. Its role is to see if the application for leave is frivolous (*Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; [2006] 5 MLJ 60). Secondly, in the matter of an application for leave under s. 181A of the Act, it would be the duty of the court to weigh all the circumstances and decide whether the claim ought to be pursued.

[37] At the leave stage, the issue is only whether it is in the best interest of the eighth respondent to pursue the claim. The apposite question therefore, should be whether, having considered the facts of the case, the eighth respondent would gain substantially in money or money's worth and that there were genuine commercial considerations for not wanting to pursue claims (*Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808 citing

the Singapore case of *Pang Yong Hock & Anor v. PKS Contracts Services Pte Ltd* [2004] 3 SLR 1 and the Canadian case of *Ontario Ltd v. Bernstein* [2000] OTC 758 with approval). It is abundantly clear that the appellants, in our judgment, have fulfilled the fourth condition. The learned judge however found that the fourth condition was not fulfilled due to the following reasons:

(a) the derivative suits of the eighth respondent would be barred by limitation;

(b) the eighth respondent was bound by the three settlement agreements;

(c) the derivative suits are barred by *res judicata*;

(d) the derivative suits would not benefit the eighth respondent; and

(e) the sixth respondent and Mohd Nathir were adjudicated bankrupts.

Limitation

[38] The learned judge had decided that the derivative suits envisaged by the appellants were time-barred under s. 6(1)(a) and (2) of the Limitation Act 1953 due to the action complained about having exceeded the six-year limitation period as set out in the table in para. 83 of the grounds of judgment. The learned judge further held that "Once an action is time-barred, it remains time-barred". The table at para. 83 of the grounds of judgment is premised on the fact that limitation period begins from the date of the last transaction while the appellants' contention is that the limitation period should begin from the date of the discovery of "suppressed" documents by the directors in control of the eighth respondent which took place in 2009 and 2012. It would be appropriate to mention at this stage that notwithstanding the authorities cited by the learned judge to support his view, His Lordship explained at para. 84(e) of the grounds of judgment a circumstance where an exception to this rule could be applied but had ruled that the exception does not apply to the present action because there was no evidence of concealment.

[39] It was the appellants' case that there was a fact of concealment from the first and second respondents' conduct as directors of the eighth respondent and this concealment was still on-going and was disclosed by the fact that:

(a) Civil Suit No: D5-24-65/2007 filed by the eighth respondent against the third respondent and Mohd Nathir where sales records and documents for financial years of 2002 to 2005 were being withheld from the current management of the eighth respondent by the third respondent for fear that his and Mohd Nathir's fraud might be exposed, this was despite the consent order dated 11 April 2007 (exh. MS16) directing the third respondent to return these documents and accounts to the eighth respondent;

(b) the third respondent had failed or refused to fully, comply with the terms of the above mentioned consent order which, *inter alia,* declared that the eighth respondent was the exclusive owner of the listed documents for financial years of 2002 to 2005 in the third respondent's custody and possession and as stated above, ordered the third respondent to return these documents and accounts to the eighth respondent. The appellants deemed the failure or refusal tantamount to an act of concealment of the eighth respondent's causes of action;

(c) the fact that the current management had yet to obtain records and documents pertaining to business conducted during financial years of 1988 to 2001 from the third respondent was further and clear evidence of concealment; and

(d) the third respondent's failure or refusal to hand over the eighth respondent's business records and documents for the period from 1988 to 2001 had prevented the first and second respondents from complying with the Kang's judgment (exh. AR41) dated 29 January 2007. It is to be remembered that the Kang's judgment had ordered the eighth respondent to produce its profit and loss accounts, auditor's reports and all documents pertaining to its business to the second appellant.

[40] The above glaring acts by the third respondent, the appellants submitted, were solely for the purposes of concealing his and Mohd Nathir's various frauds from his successors (the current management of the eighth respondent) who were still in the dark about his frauds for fear of exposure that could lead to litigation as envisaged by the appellants. As earlier stated, one aspect of the fraud was investigated by the CCM which resulted in the eighth respondent's former director, Mohd Nathir together with the late Kadar Shah and the sixth respondent being found to have committed the offences under s. 364(2) and s. 132(1) of the Act in respect of financial statements 1988 to 2001 and in September 2010. They were each subsequently imposed with a compound of RM10,000 which they had settled in due course. In view of the fact that the appellants have now, shown that the conditions mentioned in s. 29(a) and (b) of the Limitation Act 1953 enumerated in para. 84(e) of the grounds of judgment (that there were fraud and concealment) have been met, we are of the considered opinion that the exception to the "once-barred, always-barred" rule does apply and the learned judge's reliance on this point to conclude that the eighth respondent could not bring the derivative suits was based on His Lordship's misapprehension of the established facts. The learned judge therefore consistently misconceived the evidence when he found that "there is no evidence that there was concealment of the above causes of action from the eighth respondent (not the plaintiffs)."

[41] The fraudulent acts that the learned judge listed or tabulated in the grounds of judgment in paras. 81 to 83, are not subject to the Limitation Act 1953 because the frauds were only first discovered by the appellants in September 2009 during the appellants' inspection of the eighth respondent's documents and records that were then held by the CCM following their seizure during a raid of the third respondent's office on 26 June 2007 and further documents discovered after the MAH order of 26 March 2012 (exh. AR24) when the first appellant was reinstated as a director. The evidence that the appellants attached as exhibits in the appellants' first affidavit affirmed on 8 July 2014 namely exhs. AR77A to AR88A, that involved copies of cheque butts were all discovered during the appellants' examination of records and documents belonging to the eighth respondent that were seized by the CCM during the above mentioned raid. The six-year limitation period began from 1 November 2009 that is, after the completion of the appellants' examination of the eighth respondent's records and documents at the CCM's premises and would expire on 31 October 2015. Since the appellants' application for leave under s. 181A of the Act was filed on 9 July 2014, none of the causes of action as enumerated by the learned judge in paras. 81 to 84 of his grounds of judgment had exceeded the six-year limitation period. Therefore, we would reiterate what has already been stated in the appellants' application, that the appellants' 17 complaints regarding the misappropriation and improprieties which the learned judge had summarised or tabulated into the four column table in paras. 82 and 83 of the grounds of judgment have herein been shown to be in the best interest of the eighth respondent to proceed in the proposed derivative suits as applied for in the appellants' application.

Whether The Eighth Respondent Was Bound By The Settlement Agreements

[42] The learned judge on this issue held that there was no valid reason for the eighth respondent not to honour the settlement agreements. With respect, the learned judge, we found, had failed to consider the appellants' allegation that the two settlement agreements with the estate of Kadar Shah and estate of Tun Sulaiman to be invalid due to the first respondent's conflict of interest quandary as a nominee director. It is of some significance to mention that the first respondent is also named as the fourth respondent in her capacity as the administrator of the estate of Tun Sulaiman. As a nominee representative, the first respondent, when faced with a conflict of interest situation, is mandated to be guided by ss. 132(1) and (1E) of the Act which states:

> (1) A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company.
>
> (1E) A director, who was appointed by virtue of his position as an employee of a company, or who was appointed **by or as a representative of a shareholder**, employer or debenture holder, shall act in the best

interest of the company and in the event of any conflict between his duty to act in the best interest of the company and his duty to his nominator, he shall not subordinate his duty to act in the best interest of the company to his duty to his nominator." (emphasis added)

Section 132(1E) of the Act clearly requires the first respondent to act in the best interest of the eighth respondent and should not subordinate her duty to act in the best interest of the eighth respondent to her duty to her nominator.

[43] The acceptance of the two settlement proposals, we would say is not in the best interest of the eighth respondent. From the relevant documentary evidence, the synopsis of the eighth respondent's intended claim against the proposals from the estates of Tun Sulaiman and Kadar Shah are set out below:

(a) the Estate of Tun Sulaiman for RM1,504.221.00 consisting of:

(i) unauthorised reimbursements of RM777,881.88 (para. 103C of the appellants' first affidavit);

(ii) false showroom rental claims RM121,340 (para. 103D of the appellants' first affidavit); and

(iii) unauthorised directors fees of RM605,000 (para. 105 of the appellants' first affidavit),

compared with the estate of Tun Sulaiman's proposed settlement figure allegedly accepted by the eighth respondent in the sum of RM783,329 (para. 19 of the fourth respondent's affidavit);

(b) the estate of Kadar Shah:

(i) illegal sale of the eighth respondent's APs amounting to RM4,991,500 (paras. 98-100 of the appellants' first affidavit and para. 12 of the appellants' third affidavit);

(ii) unlawful transfer of the eighth respondent's funds to Volta Geria; Kadar Shah's personal company, amounting to RM1,245,891 (paras. 13, 14 and 15 of the appellants' third affidavit),

compared with the initial proposal by the estate of Kadar Shah allegedly accepted by the eighth respondent in the sum of RM907,890.97 (exh. AR119) and later increased to RM1,245,891 (para. 17 of the fifth respondent's affidavit). This discount of approximately 50% from the Tun Sulaiman's proposal and 81% from the Kadar Shah's proposal respectively of the owed amounts does not make commercial sense especially when the estate of Tun Sulaiman was worth RM2.9 million and Kadar Shah's estate were valued in 2012 at RM27,800,000 (exhs. FML1 in the fourth respondent's affidavit and exh. KS1 of the fifth respondent's affidavit). Therefore weighing all the circumstances and all the intended claims as set

out above including the estates of Tun Sulaiman and Kadar Shah, the eighth respondent stands to make substantial gain financially for such recovery by derivative actions.

[44] The two proposals were clearly intended to benefit the beneficiaries of the estate of Tun Sulaiman and Kadar Shah as the proposed amounts were lower thus it would not be wrong to infer that the same were not intended to be in the best interest of the eighth respondent. Despite formal objections by the first and second appellants by letter (exh. AR117 and exh. MS8) and the same objections repeated at the EGM on 19 February 2014 and recorded in the minutes of the said meeting (para. 6.2 of exh. AR118) the first respondent voted and the two resolutions concerning the two proposals were erroneously recorded as "duly passed". They were erroneous because the voting was only by a show of hands where the first and second appellants voted against the two resolutions while the first respondent voted for the resolutions (resulting in a vote of 2-1 against the resolutions). The minutes of the EGM did not reflect that a poll was requested or called. There is no denial by neither the first nor the second respondents concerning these established facts in any of their affidavits and consequently it is deemed admitted by the rule in *Browne v. Dunn* (1894) 6 R 67 HL. As such, the minutes are incorrect and the resolution to accept could not have in fact been passed. We would further hold that the first respondent's actions in voting to accept the offers were not in the best interest of the eighth respondent as she had subordinated her duty to the eighth respondent to her duty to her nominator. Her actions were clearly not valid due to the contravention of s. 132(1) and (1E) of the Act. Accordingly, the learned judge committed a fundamental error for failure to take into consideration such contravention leading to the wrongful acceptance of the above two settlement proposals (see para. 84(e)(2) of the grounds of judgment).

[45] For completeness, it would be necessary to mention that Tun Sulaiman's shares in the eighth respondent were insofar as known, only registered in the joint names of Kadar Shah and the sixth respondent by order of the KL High Court dated 9 November 2004 (exh. AR15). The matter as it stands, does not seem to point to any evidence being tendered by the respondents that would show a further court order or transmission of Tun Sulaiman's shares in the eighth respondent to the estate of Tun Sulaiman to entitle the first respondent to appear and represent the owner of such shares at this EGM or any other general meeting. On that basis, there is certainly force in the contention by learned counsel for the appellants that the fourth respondent had no *locus* to attend to any general meetings.

[46] In all the circumstances, and for the reasons alluded, the evidence points to the inevitable finding that there are indeed no genuine circumstances for the eighth respondent not wanting to pursue such claims. Nor have the first and second respondents as directors given any plausible

reasons not to pursue the claims and certainly neither can there be any in the light of the disclosed values of the asset lists of the two estates of Tun Sulaiman and Kadar Shah which show that both estates have sufficient monies to pay off the claims against them in full. It is thus clear that when the first and second respondents, being the purported directors, accepted the two very low value proposals, it could be inferred that they had done so to preserve and unjustly enrich the estate of Tun Sulaiman by allowing it to keep the eighth respondent's monies for the first and the second respondents and their siblings as named beneficiaries to ensure that they receive more money when the same is distributed. The same goes for the estate of Kadar Shah, that the beneficiaries benefit with more share. The ulterior motive is shown to benefit Tun Sulaiman's family. All in the family to the exclusion of the eighth respondent. This reinforces the appellants' statements that the two purported settlement proposals were not done in the best interest of the eighth respondent at paras. 144 (iii) and (iv) of the appellants' first affidavit and at para. 17 especially para. 17.5 of the appellants' third affidavit. The directors, namely the first and second respondents, stand in a dual role and have shown prejudiced commercial judgment which was not in the best interest of the eighth respondent. Furthermore, the fourth respondent as the administrator of the estate of Tun Sulaiman could not on the one hand make a proposal for the benefits of the estate of Tun Sulaiman and on the other hand as a director accept her own proposal as director of the eighth respondent. The first respondent was clearly in a conflicted position.

[47] Having considered the facts of the case and mindful of the principles laid down in *Celcom (Malaysia) Bhd*, as adverted to earlier, it is our considered opinion that the acceptance of the settlement proposals is not in the best interest of the eighth respondent. On the other hand, the evidence shows that the eighth respondent would gain substantially in money and money's worth if the appellants are allowed to pursue the claim by derivative actions.

[48] As for the alleged settlement proposal by the third respondent, the learned judge had also misdirected himself when His Lordship held that there was a settlement agreement with the third respondent when in actual fact there was merely a letter dated 26 December 2012 (exh. MS7). There was no formal agreement nor resolution by the eighth respondent in this regard. Insofar as the fourth settlement agreement with Messrs Hafiz & Co, is concerned, we agree with learned counsel for the appellants that it is irrelevant to the eighth respondent as it was between Kadar Shah (representing the sixth respondent) and Messrs Hafiz & Co which did not involve the eighth respondent. The eighth respondent therefore, could not be bound by this settlement agreement. Based on the above, the learned judge's view that the eighth respondent is bound by the settlement agreements is wholly misplaced.

A ***Res Judicata***

[49] The learned judge held that the eighth respondent was *res judicata* by filing a derivative suit as there were two consent judgments dated 7 February 2007 and 26 March 2012 (exh. AR70 and the MAH order in exh. AR24 respectively). At para. 88 of the grounds of judgment, the learned judge, however, accepted that these consent judgments could be set aside if the appellants could prove fraud. First and foremost, we would say that the standard of proof for fraud is now settled given the Federal Court's decision in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584 where fraud is proven on a balance of probabilities. We reproduce the relevant excerpt of Richard Malanjum's (CJ of Sabah & Sarawak) judgment below:

> [49] With respect, we are inclined to agree with learned counsel for the plaintiff that the correct principle to apply is as explained in *In Re B (Children)(supra)*. It is this: that at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases. As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard ... .

[50] Accordingly, given the improprieties set out above, fraud can be *prima facie* proven on a balance of probabilities in respect of the consent judgments. Secondly, the MAH order dated 26 March 2012 was a personal oppression petition under s. 181 of the Act and the eighth respondent was not a party to the MAH order as only the second to fifth respondents were the parties thereto. The eighth respondent, which was the first respondent to the suit was not a party to the MAH order. In any event, based on the decision of the British Columbia Court in the case of *Re Bellman et al and Western Approaches Ltd* (1981) 130 DLR (3d) 193, the minority group was not barred from proceeding with the derivative action by having commenced the personal action against the directors.

Whether The Derivative Suits Will Benefit The Eighth Respondent In Both Monetary And Non-Monetary Terms

[51] There were many assertions made on this subject and such assertions were accompanied by appropriate evidence that alluded to the same as shown below. The learned judge in his para. 10b of the grounds of judgment correctly alluded the object of the application for leave, that is to commence new suits against the respondents listed in column A of the table below, who were former directors of the eighth respondent:

	Column A	Column B	Column C
	Respondents	Former Director's Minimum Liability (RM)	Particulars of Evidence
1	3rd respondent	1,872,386	Recoverable by Court Order & provable by the eighth respondent's cheque butts.
2	4th respondent	2,662,627	Provable by the eighth respondent's cheque butts.
3	5th respondent	6,490,206	Liability of RM5,266,206 admitted.
4	6th respondent	1,480,000	Recoverable by Court Order.
5	7th respondent	141,127	Provable by the eighth respondent's cheque butts.
Total Recoverable for SMSB		12,646,346	

Column B shows the amount that the appellants alleged the former directors had misappropriated and would be the minimum amount that the derivative suits would claim to be returned by the said former directors to the eighth respondent. The above recoverable total of RM12,646,346 would undoubtedly be in the best interest of the eighth respondent. The maximum is considerably more as highlighted by the table in para. 113(b) of the appellants' first affidavit and thus contradicted the learned judge's statement in para. 96 of his grounds of judgment that the respondents had not adduced any credible evidence to show that the filing of the derivative suits would benefit the eighth respondent.

Only Mohd Nathir Bin Suliman (MNCS) Was Adjudicated Bankrupt

[52] In para. 95 of the grounds of judgment the learned judge said:

> the 6th Defendant and MNCS have both been adjudicated as bankrupt and there is no realistic prospect to execute such judgments so as to recover anything substantial and action is akin to throwing good money after bad.

The learned judge was clearly wrong on the facts because only Mohd Nathir was adjudicated a bankrupt, the sixth respondent was solvent. Both the sixth respondent and Mohd Nathir are siblings of the third respondent and are beneficiaries to the Estate of Tun Sulaiman. Since the learned judge had accepted the third respondent's settlement agreement with the eighth respondent by virtue of an assignment letter from the third respondent (para. 84(e)(2)(2C) of the grounds of judgment) that permitted the fourth respondent, who is also the administrator of the estate of Tun Sulaiman to deduct the third respondent's judgment debt of RM600,000 for the eighth respondent from his inheritance in the estate of Tun Sulaiman, the

implication is that the learned judge is satisfied that the third respondent's inheritance in the estate of Tun Sulaiman would not be less than RM600,000. Logically, the sixth respondent and Mohd Nathir will likewise be entitled to receive a minimum of RM600,000 and possibly more. Therefore, the learned judge had erred when he concluded that derivative suits against the sixth respondent and Mohd Nathir "is akin to throwing good money after bad".

[53] With deference to the learned judge and for the reasons discussed, His Lordship's finding that the fourth condition was not fulfilled is inherently fallacious. The evidence shows that *prima facie* it appears to be in the best interest of the eighth respondent for leave to be granted.

Postscript

[54] As a necessary postscript to our judgment, there are several points which we would like to make at this stage. The learned judge assumed and indeed took into account irrelevant considerations that the derivative suits would attract negative publicity. We would in this regard, in disagreeing with His Lordship, emphasise that the prospect of recovering RM12 million of its own funds makes the derivative suits a positive and beneficial act to the eighth respondent. The prospect of interest income is a definite plus for the eighth respondent. Be that as it may, it would not be justified for the learned judge to wrongly assume and take into account irrelevant considerations that the publicity would be negative for the eighth respondent. Such assumption in our opinion is not supported by any proof.

[55] The learned judge had also made various unjustified assumptions to support His Lordship's decision that the eighth respondent had to expend a lot of time, effort and legal expense to prosecute the derivative suits. His Lordship had in fact raised various possibilities as grounds to deny the appellants leave to commence derivative actions. The possibilities, the learned judge said, included counterclaims which could be filed against the eighth respondent for breaches of the four settlement agreements, the eighth respondent had to bear the legal costs of the successful opposing parties at all levels of court and might be liable to be sued for damages for tort. The learned judge we find appears to have assumed too far without any support of documentary evidence.

[56] At para. 91 of the grounds of judgment, the learned judge had set out at length his perceived practical problems that would arise in prosecuting the derivative suits. According to the learned judge, relevant witnesses might not be available, even if they were available, these witnesses might not be able to remember all the important events due to passage of time and genuine loss of memory adding that all the relevant documents to support the derivative suits might not be available as a long period of time had lapsed. The learned

judge, unfortunately, had undoubtedly made the assumptions unsupported by any evidence at this leave stage. The potential recovery of embezzled monies in the sum of RM12 million is worth the risk because the scenarios that the learned judge cautioned as possibilities are, in our view, remote. This is because the derivative suits against the estates of Tun Sulaiman and Kadar Shah are for the return of the embezzled funds that have been admitted and the dispute is only about the appellants' refusal to accept return of monies at a huge discount and both respondents have the ability to pay whereas the derivative suits against the third and sixth respondents are for the execution of the court orders that have already been obtained. Furthermore, the appellants have abandoned the planned derivative action against the legal firm of How, Zul & Low because the appellants had accepted the eighth respondent's explanation that the firm had fully complied with the consent order. The appellants have also abandoned a planned derivative action against the legal firm of Hafidz & Co as the appellants had accepted the eighth respondent's explanation that Suit 1061/2009 was a representative case by Kadar Shah for the sixth respondent. We therefore, have very little hesitation in rejecting the learned judge's reasoning on these assumptions which we find to be totally unfounded.

[57] The learned judge had also held that once the decision at the EGM accepting the proposals of the estates of Tun Sulaiman and Kadar Shah was not challengeable then leave under s. 181A of the Act was not obtainable. We would, on this aspect say that the learned judge appears to have missed the important point that has emerged from the evidence that the EGM for the ratification of the settlement agreements where the majority shareholders agreed to the estates of Kadar Shah and Tun Sulaiman heavily discounted offers were not in the best interest of the company. Moreover, it does not seem to be realised by His Lordship that the issue had been decided dehors s. 181D of the Act which provides that even if there was ratification or approval, that does not prevent the appellants from bringing, intervening in or defending proceedings with the leave of the court nor the application for leave to defend shall be stayed or dismissed by reason only of the ratification or approval.

Conclusion

[58] The appellants have demonstrated with ample documentary evidence that the learned judge had erred in principle and had taken into account various irrelevant considerations without the support of documentary evidence which warrants appellate interference. The first respondent namely Faridah Md Lazim and the second respondent as majority directors of the eighth respondent on the one hand and Faridah Md Lazim as the fourth respondent being the administrator of the estate of Tun Sulaiman and shareholder of the eighth respondent as well as beneficiaries of the said estate

were in a position of conflict and in breach of their fiduciary duties to the eighth respondent when without calling or obtaining the BOD's consent had, despite admissions of misappropriation of the eighth respondent's monies by the late Tun Sulaiman and Kadar Shah, failed, refused and neglected to execute the consent judgment and other judgments already obtained by the eighth respondent in its favour. The first and second respondents' motives are not *bona fide*. Their action was obviously to ensure that through their office as majority directors of the eighth respondent's board they would obstruct the first appellant (as director) and the second appellant (as shareholder) from pursuing any actions against the fraudulent conduct by the late Tun Sulaiman and Kadar Shah the relatives of the first and second respondents. By agreeing to a much lower payback offers by the estates of Tun Sulaiman and Kadar Shah made purportedly in 2013 under the guise of settlement agreements, their action, objectively, is not in the best interest of the eighth respondent when it is unrebutted in their affidavits that the estate of Tun Sulaiman has the unrefuted monies to repay most if not all the monies the late Tun Sulaiman had allegedly misappropriated. The estate of Tun Sulaiman by an open offer to settle shows implied admission of misappropriation of the eighth respondent's funds. In simple terms, if less monies leave the estate of Tun Sulaiman then there is more money for distribution to the beneficiaries who include all the named first to seventh respondents herein. Likewise, the same rationale applies to the estate of Kadar Shah.

[59] On the authority of the case of *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] 1 All ER 1126 the court will not interfere in the management of the eighth respondent if the decisions were made *bona fide*. As such, this gives the court the opportunity to correct the situation if the management's decision is not made *bona fide*. From this background and as a matter of fact, the appellants have shown on the basis of probability that the first and second respondents are not acting in the best interest of the eighth respondent. This conversely proves that the appellants are in fact acting in good faith for the eighth respondent and appear *prima facie* to have acted in the best interest of the eighth respondent to recover these monies. Mindful of the necessity, as a matter of judicial prudence, for us to exercise a greater caution in satisfying ourselves that the requirements under s. 181A of the Act are met, we are fully satisfied that all the four conditions have been fulfilled collectively. We therefore, hold that condition 1 has been fulfilled as the originating summons is the mode for leave application applicable filed in this instance. Condition two has been satisfied as 30 days notices were given by both the first and second appellants with sufficient particularity. As regards condition 3, there is no express requirement that s. 181B of the Act requires leave application to be filed within any specific time frame after the expiry of the 30 days as such there is no breach of this section. Nevertheless, in the light of the appellants' real efforts in this instant case to exhaust "internal processes", the appellants' filing of this application on 9 July 2014 was not unreasonable and

the appellants should not be penalised against their rights to bring derivative actions in the best interest of the eighth respondent. We are also satisfied that condition 4 has been fulfilled for the reasons we have alluded to earlier.

[60] In conclusion, it is our judgment that the present appeal is one which clearly falls within the class of cases where appellate intervention of this court is warranted. The learned judge had fallen into error in misapprehending the law and evidence in dismissing the appellants' application. While the judgment of the learned judge is entitled to utmost respect, we however find a valid justification for the reasons we have alluded, to disturb His Lordship's findings given the factual scenario and the law. In the premises, we unanimously allow the appeal and enter judgment in terms of all prayers save prayers 1(A)(iii) and (iv) as the appellants by their own admission, have abandoned planned derivative actions against the law firms of How, Zul & Low and Hafidz & Co. There is no order as to costs.